No. 80-328

In The

Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

v.

ROGER BELTON,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

JOINT APPENDIX

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Petition for Certiorari Filed September 2, 1980
Certiorari Granted January 19, 1981

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Chronological List of Relevant Docket Entries

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES,
No. 1-78-28 The People of the State of New York
v. Roger Belton

May 24, 1978	—	Indictment charging defendant with Criminal Possession of a Controlled Substance in the 5th Degree filed.
May 31, 1978	—	Arraignment of defendant; not guilty plea entered.
July 1, 1978	—	Defendant's omnibus pre-trial motions filed.
July 17, 1978	—	People's answering affidavit in response to defendant's omnibus motions filed.
July 26, 1978	—	Oral argument on motion. Suppression hearing commenced; testimony of Douglas Nicot, for the People, direct and cross.
August 2, 1978	—	Suppression hearing continues; testimony of Douglas Nicot, cross. Findings of fact and conclusions of law orally placed on record. Suppression motion denied.
August 17, 1978	—	Defendant pleads guilty to reduced charge of Attempted Criminal Possession of a Controlled Substance in the 6th Degree.
August 29, 1978	—	Second felony information filed. Defendant sentenced to 1½-3 years in state prison. Defendant's motion for stay of execution of judgment pending appeal

filed. Order granting stay of execution of judgment pending appeal and fixing bail filed. Notice of appeal filed.

December 19, 1978 — Defendant's motion for extension of time to perfect appeal in New York Supreme Court, Appellate Division, Fourth Department filed.

January 19, 1979 — Order of the New York Supreme Court, Appellate Division, Fourth Department granting defendant's motion for extension of time to perfect appeal filed.

May 22, 1979 — Opinion and judgment of the New York Supreme Court, Appellate Division, Fourth Department, unanimously affirming defendant's judgment of conviction filed.

June 27, 1979 — Order granting leave to defendant to appeal to New York Court of Appeals and continuing bail filed.

August 29, 1979 — Defendant's motion for extension of time to perfect appeal in New York Court of Appeals filed.

September 4, 1979 — People's answering affidavit in opposition to defendant's motion filed.

September 18, 1979 — Order of the New York Court of Appeals granting defendant's motion for extension of time to perfect appeal filed.

September 26, 1979 — Defendant's motion to maintain appeal as poor person filed.

Indictment, Filed May 24, 1978

October 23, 1979 — Order of the New York Court of Appeals granting defendant's motion to appeal as poor person filed.

June 5, 1980 — Opinion and judgment of the New York Court of Appeals reversing defendant's judgment of conviction and dismissing indictment filed.

Indictment, Filed May 24, 1978

STATE OF NEW YORK
COUNTY OF ONTARIO COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

vs.

ROGER BELTON,

Defendant.

THE GRAND JURY OF THE COUNTY OF ONTARIO, by this indictment, accuse the defendant of the crime of CRIMINAL POSSISSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE COMMITTED AS FOLLOWS:

The defendant, in the County of Ontario, on or about April 9, 1978, knowingly and unlawfully possessed one or more preparations, compounds, mixtures or substances of an aggregate weight of one-eighth of an ounce or more containing a narcotic drug, to wit: the defendant possessed 10.08 grams of cocaine.

James R. Harvey, District Attorney

Bunny Bell, Acting Foreman

1-78-28

Notice of Motion, Dated June 30, 1978

(SAME TITLE)

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of PAUL J. CAMBRIA, JR., sworn to on the 30th day of June, 1978, and upon all the proceedings heretofore had herein, a motion will be made in this Court on the 26 day of July, 1978, at 10:00 a.m. in the forenoon of that day or as soon thereafter as counsel can be heard for orders granting the relief requested in the affidavit annexed hereto, together with such other and further relief as may be just and proper under the circumstances herein.

DATED: Buffalo, New York
June 30, 1978

Yours, etc.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.,
Attorney for Roger Belton
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

TO: JAMES HARVEY, ESQ.
Ontario County Courthouse
Main Street
Canandaigua, New York 14424

Affidavit of Paul J. Cambria, Jr., Dated June 30, 1978

(SAME TITLE)

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

PAUL J. CAMBRIA, JR., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York and I am a member of the law firm Lipsitz, Green, Fahringer, Roll, Schuller & James, with offices located at One Niagara Square, Buffalo, New York, 14202.

2. I am thoroughly familiar with all the facts and circumstances surrounding this case by reason of my own investigation and conferences had with the defendant, a review of the relevant pleadings, proceedings and the law in this matter.

3. The defendant stands charged with criminal possession of a controlled substance in the fifth degree in violation of P. L. §220.09(1). The defendant was arraigned on or about May 31, 1978, and thereafter the matter was set down for the filing of motions within the forty-five (45) day period provided for in CPL §255.20.

4. This affidavit is made on your deponent's information and belief, the sources of such information and the grounds for said belief being the pleadings herein, conferences had with the defendant and your deponent's investigation into the circumstances.

5. This affidavit is made in support of an application for a number of different forms of relief. The affidavit is divided into a number of different subheadings, each requesting an order granting different relief from the Court. There follows an index of the various forms of relief requested, together with the page number upon which they appear.

• • •

Affidavit of Paul J. Cambria, Jr., Dated June 30, 1978

MOTION TO SUPPRESS

52. The defendant respectfully moves, pursuant to Article 710 of the Criminal Procedure Law that any and all evidence of whatsoever kind and nature acquired directly or indirectly as a result of the search and seizure conducted of items of personal clothing of the defendant, or in areas in which the defendant had a legitimate expectation of privacy, specifically a jacket from which it is alleged that the subject controlled substances were discovered, together with any and all fruits obtained therefrom or thereby be in all respects suppressed.

53. On or about April 9, 1978, at approximately 9:50 a.m. on the New York State Thruway, Trooper Douglas Nicott stationed at Junius Ponds, New York, stopped a vehicle in which the defendant was a passenger, and which was owned by one Larry Vance, and was being driven by an individual other than the defendant. Such vehicle was also occupied by approximately four individuals.

54. Subsequently, Trooper Nicott ordered the defendant out of the car and directed him to "empty his pockets" and otherwise subjected his person to a search and seizure.

55. Officer Nicott thereafter picked up a jacket allegedly belonging to the defendant, opened a zipper pocket and allegedly discovered a controlled substance which is the subject of the indictment herein and a card bearing the name of the defendant, Roger Belton.

56. That such search and seizure was violative of the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 12 of the New York State Constitution as well as the New York State Civil Rights Law.

57. That said search and seizure was conducted in the absence of a warrant or probable cause, was not incident to a valid

arrest, nor made pursuant to any of the other recognized limited exceptions to the warrant requirement.

58. Under no circumstances did the defendant in any way knowingly and voluntarily consent to any such search and seizure, nor did he at any time give Trooper Nicott permission to search his belongings.

59. That immediately prior to the conduct of the search and seizure herein, defendant was committing no crime in the presence of the officer, nor did the officer have probable cause to so believe, nor was there any other legitimate and legal basis upon which the subject search and seizure may be based.

WHEREFORE, it is respectfully requested that the evidence seized herein which forms the basis for the indictment herein together with any and all fruits thereof be in all respects suppressed.

OTHER MOTIONS

60. Depending upon the Court's granting of the relief requested in these papers, the defendant respectfully reserves the right to make further and additional motions which may be required and advisable in light of the Court's ruling on relief sought herein.

61. It is further requested that the defendant have an opportunity to make any and all motions necessary in connection with the alleged statements made by him at the time of his arrest.

62. It is further requested that the Court grant such other and further relief as it may deem just and proper under the circumstances of this case.

/s/PAUL J. CAMBRIA, JR.
Paul J. Cambria, Jr.

(Jurat omitted in printing)

Affidavit of Roger Belton, Dated July 1, 1978

(SAME TITLE)

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

ROGER BELTON, being duly sworn, deposes and says:

1. I am the defendant in the above referenced case, and I am represented by PAUL J. CAMBRIA, JR., of Lipsitz, Green, Fahringer, Roll, Schuller & James, One Niagara Square, Buffalo, New York, 14202.

2. I have read my attorney's affidavit and the allegations set forth therein are true and accurate to the best of my knowledge and belief, and I join in them and join in my attorney's motion for suppression of the evidence herein.

3. That at no time on April 9, 1978, did I in any way consent to the search and seizure, nor did I in any way give permission to Officer Nicott to search any of the articles or areas involved.

WHEREFORE, it is respectfully requested that the Court grant the motion to suppress, and grant the various other applications made by my attorney on my behalf.

/s/ROGER BELTON
Roger Belton

(Jurat omitted in printing)

**Answering Affidavit in Response to Motion,
Filed July 17, 1978**

(SAME TITLE)

STATE OF NEW YORK }
COUNTY OF ONTARIO } SS:

JAMES R. HARVEY, being duly sworn, deposes and says:

1. That he is the District Attorney of the County of Ontario, New York.

2. That this affidavit is made in response to defendant's Omnibus Motion dated June 30, 1978.

• • •

12. MOTION TO SUPPRESS THE EVIDENCE OBTAINED FROM THE VEHICLE IN WHICH THE DEFENDANT WAS A PASSENGER

21. The search of the vehicle and defendant's belongings by Trooper Nicot was in all respects legally sufficient. The defendant's Constitutional Rights were in no way violated by Trooper Nicot. However, the People have no objection to the Courts conducting a hearing in regard to the lawfulness of the search which obtained the evidence which is the basis of the charge set forth in the indictment.

WHEREFORE, the People request an Order of this Court denying defendant's motion in all respects, with the exception of the demands which the People indicate that the defendant is entitled to as a matter of law, and for such other and further relief as to the Court may seem just and proper.

/s/JAMES R. HARVEY
James R. Harvey, District Attorney

(Jurat omitted in printing)

Transcript of Proceedings, Dated July 26, 1978 and August 2, 1978

STATE OF NEW YORK
COUNTY OF ONTARIO COUNTY COURT

The People of the State of New York

against

Roger Belton,

Defendant.

BEFORE:

Hon. George A. Reed, County Court Judge.

HELD:

July 26, and August 2, 1978 at a Regular Adjourned Term of County Court held in and for the County of Ontario at Canandaigua, New York.

APPEARANCES:

For the People, James R. Harvey, Esq., District Attorney

Attorneys for the Defendant, Lipsitz, Green, Fahringer, Roll, Schuller and James, BY: Paul J. Cambria, Jr., Esq., of counsel.

Roger Belton, the defendant, appears in person.

[5]

• • •

MR. HARVEY: Your Honor, the people are ready to proceed in regard to the

[6]

suppression in the case of the People v. Roger Belton.

We call as our first witness Douglas Nicot.

DOUGLAS NICOT, called in behalf of the people, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HARVEY:

Q. State your full name please?

A. Douglas Nicot.

Q. What is your occupation?

A. Assigned to the New York State Police Troop T at Junius Ponds.

Q. How long have you been a New York State Policeman, Trooper Nicot?

A. Over twelve years.

Q. What are your primary duties with the troopers?

A. Investigating accidents and investigating the possibility of crime and patrolling the Thruway.

Q. I call your attention to April 9, 1978. Do you recall that day?

A. Yes, I do.

Q. Were you on duty that particular day?

A. Yes, I was.

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Q. What area of the Thruway were you on duty, can you recall?

A. Yes. I was working Post 18 which is generally four townships which includes the Town of Phelps, Town of Manchester, Town of Farmington and Town of Victor.

Q. Now, Trooper Nicot, this is exclusively on the Thruway, is that correct?

A. That's correct.

Q. Did you have any particular device on your vehicle on that particular day?

A. Any particular device?

Q. Yes. Were you on radar duty?

A. No, I was not.

A. And did there come a time when you were in the area of the Town of Phelps on the Thruway that you noticed a vehicle behind you proceeding at a high rate of speed?

A. Yes, I was.

Q. Can you describe that vehicle?

A. Yes, a late model Chrysler, blue in color going west in the passing lane.

Q. Where were you located?

A. I was also located in the westbound, in the passing lane.

Q. When you first observed this vehicle, what did you first do?

[8]

A. When I first observed it, it was rapidly gaining on my patrol vehicle so I pulled my patrol vehicle to the driving lane or right hand lane of the Thruway and continued to observe the vehicle and there came a time when this vehicle did pass my patrol car.

Q. Okay. Did you have an opportunity to look at your speedometer at about the time the vehicle passed you?

A. Yes. I clocked this vehicle at a time when my patrol car was not gaining on the observed vehicle and it was not gaining on me and it was at that point I determined the vehicle was exceeding the speed limit and it was going at about seventy-five miles per hour.

Q. Okay. What did you do then?

A. Pulled my patrol vehicle to the right hand driving lane and at that point the vehicle I was observing passed my patrol vehicle.

Q. Okay. What is the speed limit on the New York State Thruway, do you know?

A. Fifty-five miles per hour.

Q. After your vehicle was passed by the late model Chrysler, what did you do?

A. At that point I continued behind the Chrysler for a short period of time and did motion it over, turned my

[9]

grill lights on and a vehicle did pull over to the north shoulder of the road.

Q. What type of vehicle were you driving on patrol on this particular day, do you recall?

A. Yes. It was a 1976 Plymouth, an unmarked patrol car.

Q. Okay. And after you pulled this vehicle over, what did you do next?

A. At that point I proceeded to walk up to the driver's window.

Q. Let me get this straight. Is your vehicle in back of the Chrysler?

A. Yes, it was.

Q. Okay. Go ahead.

A. I walked up to the Chrysler, to the driver's door, and the driver rolled the window down and I asked for a license and registration.

Q. About what time is this now?

A. About 9:00 a.m.

Q. And then what happened?

A. The driver produced a license and a registration was also produced at that time and at that point I did smell marijuana burning or burned marijuana from within the vehicle.

[10]

MR. CAMBRIA: That is objected to, Your Honor.

MR. HARVEY: Your Honor, I will qualify the witness.

THE COURT: The objection at this time will be sustained.

BY MR. HARVEY:

Q. Trooper Nicot, have you ever had any schooling in regard to drug detection?

A. Yes. I have been to three different schools.

Q. Okay. Would you tell the court where these schools were held and for what time in each school?

A. 1966 I graduated from the New York State Police Academy, the Academy being at Oneonta State Teachers College and also in Albany and in 1974 I graduated from the Bureau of Narcotic and Dangerous Drug School.

Q. How long a course was that?

A. That was a two week course.

Q. Where was that held?

A. That was held at the State Police Academy also in Albany but it was run by the Department of Justice or the old Bureau of Narcotic and Dangerous Drug.

Q. Did your education include drug detection?

[11]

A. Yes, it did.

Q. In that case tell the court how you determined its marijuana exclusively?

A. With marijuana alone, the history of the plant, the different types of marijuana, the identification of both male and

female plants, the identification of the seeds, also the smell of burning marijuana and also field tests that were conducted for positive identification or belief of positive identification.

Q. These were all done clinically as part of the class, is that correct?

A. Yes.

Q. Within the laboratory situation. You said there were three schools. What was the third?

A. I recently graduated from the Drug Enforcement Administration School also run by the Department of Justice.

Q. How long a school was that?

A. Also two weeks.

Q. Where was it held?

A. Also at the State Police Academy in Albany.

Q. What did you do in regard to the detection of marijuana in this particular case?

[12]

A. Basically that same thing. All of the afore mentioned facts were brought out plus some new. Observing seeds under a microscope. Marijuana seeds have a particular characteristic that most seeds do not.

MR. CAMBRIA: I'm sorry. Do we have a date on the last school?

THE WITNESS: Last week.

MR. CAMBRIA: Then I object to it, Your Honor, as being after the time of the search we are talking about.

THE COURT: Overruled. It might be receivable subject to confirmation of something he observed at an earlier time. It may go to its weight but not admissibility.

BY MR. HARVEY:

Q. Now, you testified at the time the license and registration were produced in this vehicle you were on what side of the vehicle?

A. I am on the driver's side.

Q. Could you tell us whether or not the window was up or down on that side?

A. The driver rolled the window down when I approached the side of the vehicle and the window remained down during

[13]

the process of getting the license and registration.

Q. Then what happened?

A. That was at the point when I determined there was burned marijuana in the vehicle or the aroma from burnt marijuana coming from the car.

Q. Okay. What did you do then?

A. At that point I asked the driver a series of minor questions as to who owned the vehicle. The vehicle was registered to a female who resided in Buffalo who was not with the vehicle. Nobody in the vehicle was a relative of the owner of the vehicle.

Q. How many people were in the vehicle? Did you notice at this time?

A. Yes. There were four colored males.

Q. By colored, do you mean black?

A. Yes, I do.

Q. Okay. Go ahead.

A. Two in the front seat, two in the back seat.

Q. Four all together?

A. That's correct.

Q. Go ahead. What did you do next?

A. At that point I advised the driver that I did smell marijuana and to please step out of the vehicle and in

[14]

succession the four occupants were taken from the vehicle and placed under arrest for unlawful possession of marijuana.

Q. Okay. Now, did you later determine the identification of all these four occupants of the vehicle?

A. Yes, I did.

Q. Do you recognize the defendant in this case?

A. Yes, I do.

Q. Okay. Would you point to him and state his name?

A. His name is Roger Belton.

MR. HARVEY: For the record, he has pointed out the defendant at counsel table.

BY MR. HARVEY:

Q. Where was he located in the vehicle, do you recall?

A. Yes. He was sitting in the rear of the vehicle behind the driver.

Q. Okay. And who got out of the vehicle first?

A. The fellow who presented a license in the name of Vance who was driving the vehicle who later turned out to be Ronald Sessum.

Q. Okay. Who got out next?

A. The other passenger in the front seat who was a Mr. Brown, Jerry Brown.

[15]

Q. Okay. Who got out next?

A. Mr. Vance.

Q. Okay.

A. And finally, Mr. Belton.

Q. Okay. And you placed all four of the individuals under arrest for unlawful possession of marijuana at that time?

A. Yes, that's correct.

Q. Then what did you do?

A. With this particular defendant?

Q. Yes.

A. Each particular defendant, individual, was patted down after he got out of the car for the possibility of a weapon and I split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other and then I observed what was in the car.

Q. Okay. You went back to the car after you got all the defendants segregated?

A. Yes. We are all in close proximity of the car.

Q. All around the car?

A. Yes.

Q. You went back to the car for what purpose?

A. To retrieve an envelope which I had seen on the floor

[16]

boards of the car, a small manila envelope approximately four inches high and approximately two inches wide.

Q. You saw a small envelope where in the car?

A. On the floor boards, the front floor boards. It was on the floor boards of the front seat near the passenger side.

Q. What did you do next with this envelope?

A. I determined that it did contain a trace of marijuana in the envelope.

Q. Were there any markings on this envelope?

A. Yes. The envelope had been stamped "Supergold." I seen these initials before and evidently it's a way of distributing—

MR. CAMBRIA: I object to "evidently," Your Honor.

THE COURT: The court will disregard it.

BY MR. HARVEY:

Q. Have you seen this type of envelope before?

A. Yes, I have.

Q. Okay. Go ahead. What did you know it to be in your experience?

A. Containing marijuana.

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Q. You say there was a substance in the envelope?

A. Yes, there was.

Q. Which you determined to be, with your experience, marijuana?

A. Yes.

Q. What did you do next?

A. At that point all four subjects were brought together and I retrieved my summons book from my patrol car and I read their rights under the Miranda decision to them jointly and then I asked each one individually if they understood their rights and they all answered in the affirmative. At that point, to check for further contraband, each individual was searched, the contents of their pockets was searched individually and then I completed a search of the vehicle.

Q. Okay. What else, if anything, was in the vehicle at this time, any items of clothing?

A. Yes.

Q. Go ahead.

A. During the search of the vehicle a black leather jacket was located in the back seat, in the center of the back seat. A further search revealed that there was a United States twenty dollar bill in one pocket and

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contained in that twenty dollar bill was a white crystalline powder. In the opposite pocket there was a plastic bag containing a larger amount of white powder.

Q. I show you People's Exhibit 1 marked for identification and ask you if you recognize it, Trooper Nicot?

A. Yes. I believe this to be the same twenty dollar bill I retrieved from the pocket of the black leather jacket.

Q. How do you recognize it?

A. The evidence tag that was secured at State Police Junius Ponds, New York by myself giving a description of the bill and the contents of the white powder.

Q. Okay. Around the twenty dollar bill?

A. That's correct.

Q. I show you People's Exhibit 2 marked for identification and ask you if you recognize it?

A. Yes, I do.

Q. What is it?

A. That is the plastic bag that was retrieved from the opposite pocket of the black leather jacket containing a white crystalline powder. It was also placed in a bag by myself along with this evidence tag signed by me.

Q. And your testimony was that People's Exhibits 1 and 2

[19]

marked for identification were found in opposite pockets, is that correct, in the black jacket?

A. They were.

Q. What, if anything, else did you find in this jacket?

A. There were two marijuana cigarettes in a third pocket. This jacket contained multiple pockets and there were two marijuana cigarettes rolled up, unsmoked, and a further search of the car revealed approximately five or six partially smoked marijuana cigarettes in the ashtrays of the vehicle.

Q. Okay. Go ahead. What else, if anything, did you find in the black jacket?

A. There was some identification in the name of Roger Belton, a blue-cross and blue shield card, and I believe there was another card, possibly a union type card with his name on it also.

Q. Okay. Do you still have these items in your evidence locker?

A. They are in my personal locker, yes.

THE COURT: You say "These items." You are now referring—

THE WITNESS: The identification card only.

THE COURT: What happened to the

[20]

two marijuana cigarettes?

THE WITNESS: All four subjects were processed through Justice Court in the Town of Phelps, all four for unlawful possession of marijuana. The marijuana was forwarded for destruction to the State Police Laboratory in Albany.

THE COURT: Is that also true of the five or six partially smoked butts in the ashtrays?

THE WITNESS: Yes. I believe they were all forwarded. I did retain the empty bag marked "Supergold." I have that in my possession.

BY MR. HARVEY:

Q. Along with the identification you found in the jacket?

A. That's correct.

Q. Now, after finding this identification of the defendant Roger Belton in this black jacket, did you have any conversation with Mr. Belton?

A. Yes, I did. I had conversation with all four defendants at that time.

Q. Go ahead.

A. I asked first of all if anyone owned the jacket. They all denied ownership.

[21]

MR. CAMBRIA: Your Honor, at this time I'm going to object to any statement attributed to Mr. Belton since I was told there were none.

Now, if there are, then apparently it's part of the statement.

THE COURT: The question is not objectionable. It's premature. If there was an answer in the affirmative, then you may renew the motion.

BY MR. HARVEY:

Q. Go ahead.

A. All four subjects denied ownership of the jacket and a count of the clothing determined that this was a fifth overcoat or jacket type piece of garment that was in the vehicle. There were five outer garments.

Q. Four defendants, five jackets in the vehicle?

A. That's correct.

Q. Did there come a time you placed all four defendants under arrest for possession of the white powder I believe you recognized as cocaine?

A. Yes.

Q. Is that correct?

[22]

A. That's correct.

Q. What did you do with the black jacket in which People's Exhibits 1 and 2 in the identification of Mr. Belton came from?

A. After the jacket was searched thoroughly it was returned to Mr. Belton when he was released from the Ontario County Jail after posting bail.

MR. HARVEY: Thank you. I have no further questions.

CROSS EXAMINATION BY MR. CAMBRIA:

Q. Officer, did you make any report or memo, note in connection with this case?

A. Yes, sir, I did.

Q. All right. Do you have those with you?

A. No. They have been forwarded through the proper channels.

Q. Now, Officer, have you testified in hearings such as this before?

A. Not in this courtroom, no.

Q. Well, in other courtrooms, is that correct?

A. Yes, I have.

Q. All right. And, as a matter of fact during the course of your examination attorneys have asked you for those

[23]

notes, have they not?

A. Yes.

Q. So therefore you expected to be asked for those notes here today, didn't you?

A. No, I didn't.

Q. You didn't?

A. No, I did not.

Q. You are telling me that on several occasions or let me ask you, on several occasions in the past have you been asked for notes of prior reports you have made?

A. I don't recall specifically ever having been asked for notes.

MR. HARVEY: Your Honor, I object. I don't see the relevance to this particular testimony. He testified he made the reports and submitted them through channels. He doesn't have them today. I can't see anything else that is relevant.

THE COURT: We have a discovery motion. If he made the reports, his credibility is just as, he has the same right to be attacked in this proceeding and counsel is entitled to have the notes for

[24]

purposes of cross examination. He is probably entitled to an adjournment until they are produced.

MR. CAMBRIA: I will continue to cross examine. My request stands for the prior reports and notes.

THE COURT: They have been denied until such time as the witness testifies and that has related to the trial and you also have the right and I now grant you an order that the notes on prior reports be furnished to you for your purposes in cross examining the witness in this proceeding.

MR. CAMBRIA: Thank you, Your Honor.

BY MR. CAMBRIA:

Q. Officer, you testified before the Grand Jury?

THE COURT: What are you going to do, ask for an adjournment?

MR. CAMBRIA: I am, Your Honor.

THE COURT: You are entitled to it. They are not available?

THE WITNESS: Judge, all the reports for this case have

[25]

been forwarded. I have some personal—

THE COURT: Forwarded where?

THE WITNESS: Forwarded through our channels, arrest reports and investigative records. I have personal notes as to who was sitting where, referring to—

THE COURT: Counsel has an absolute right to have prior records for the purpose of impeachment under the cases.

THE WITNESS: I can obtain those.

THE COURT: That blows this hearing out of the water it looks like to me.

MR. HARVEY: I suggest, Mr. Cambria continue. If he still wants another shot at the witness, it makes no difference to me.

MR. CAMBRIA: I would be willing to venture into some cross, Your Honor, but I would really—

THE COURT: Where you present in Phelps? I am concerned now. I don't know whether the prosecutor intends to call the other witnesses to confirm the smell of

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marijuana. There has been no evidence authorizing a pat down as I see it here so far. There has been nothing to indicate what traffic violation, perhaps which marijuana. There has merely been a violation. At that time there would have been no authority for a pat down. The stuff was not found as a result of a pat down. The presence of burned cigarettes in the cigarette ashtray would tend to

reenforce the credibility of the defendant — excuse me — of the witness since we had a whole line of sniffing cases. Did you defend this defendant in Phelps Justice Court?

MR. CAMBRIA: No, not at all, Your Honor.

THE COURT: Did you any defendant?

MR. CAMBRIA: No, sir. They all were unrepresented.

THE COURT: What was presented there?

MR. HARVEY: On the violation

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Mr. Cambria wasn't involved. The defendants went in and pled guilty right out of the box so to speak and the other matter was held for the preliminary examination.

THE COURT: Violation of a misdemeanor?

MR. CAMBRIA: Charged with a violation.

My understanding, Your Honor, is a plea was extracted before they were released. At that time, while they were in custody, there were some representations made so, as I say, I am not even convinced of the validity of the plea but, nonetheless, it was a violation.

THE COURT: Well—

MR. CAMBRIA: Your Honor, obviously it's important to me to see the other eports, all the reports.

Ultimately, it still seems to me, we are getting down not only to a pat down but then too—

THE COURT: Pat down seems to go

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out of this case since nothing was discovered. It's just part of the res gestae. It didn't seem to me to be offensive since it didn't produce anything.

MR. CAMBRIA: I think –

THE COURT: It didn't produce anything on the testimony so far.

MR. HARVEY: No.

THE COURT: Then you have smell and you have a warrantless search for contraband.

MR. CAMBRIA: In the jacket. If we are talking about burned marijuana, it seems to me being in a ashtray as opposed to a jacket, even if we assume that the smell is valid and genuine and so not unlimited authority to search.

THE COURT: You are into a limited search area although after the arrest was made. You and I are both familiar with the line of cases.

Are you willing now to proceed without the officer's reports? If not, I would

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think in the interest of justice you are entitled to an adjournment until they can be produced. I am reluctant to do that but you are on the trial calendar but your case is at the tail end so I can squeeze you in for a continuance of this hearing until you are reached for trial.

MR. CAMBRIA: Your Honor, I wonder if we could conduct perhaps the rest of the or as far as I can go today?

THE COURT: Perhaps subject to recall?

MR. CAMBRIA: Subject to recall and asking for the reports.

THE COURT: Mr. Harvey?

MR. HARVEY: Whatever the court and counsel desire, Your Honor, it makes no difference to me. I certainly will make, have Trooper Nicot produce the records. That much I can assure the court will be done. It will probably be by this afternoon.

THE COURT: All right. We will proceed without prejudice to the right-

[30]

What am I going to do about making a decision and findings of facts and conclusions of law?

MR. CAMBRIA: Your Honor, I think we might—

THE COURT: You can tell me whether you wish to continue or close at the end.

MR. CAMBRIA: All right. Thank you.

BY MR. CAMBRIA:

Q. Officer, did you testify before the Grand Jury in this case?

A. Yes, I have testified.

Q. Did your testimony there relate to the subject matter to which you have testified to today?

A. Yes.

MR. CAMBRIA: May I have the Grand Jury testimony?

MR. HARVEY: Sure.

THE COURT: So ordered.

Woud you put on the record the page numbers you are furnishing please.

MR. HARVEY: Sure will, Your Honor.

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I am providing counsel with pages 3 through 20 of the Grand Jury testimony of this witness.

MR. CAMBRIA: Thank you. May I have a moment, Your Honor?

Thank you, Your Honor.

THE COURT: Have you had adequate time to examine the minutes?

MR. CAMBRIA: Yes, I believe so.

THE COURT: Then you may proceed.

BY MR. CAMBRIA:

Q. Now, Officer, you testified here you were driving on this Thruway and this car started to approach you from the rear, is that correct?

A. That's correct.

Q. And you were passing in the passing lane, is that correct?

A. That's correct.

Q. And you started to speed up, is that correct, and the car caught up to you, is that true?

A. No. I speeded up to the point where the car was not gaining on me anymore.

Q. All right. And then you pulled over and ultimately the

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car passed?

A. That's right, After I got a clock on the passing vehicle in the passing lane, I pulled in the driving lane and allowed the vehicle to pass.

Q. Now, I believe you walked up to the driver's side of the vehicle and the driver rolled the window down and you asked for the registration and license and he produced it?

A. That's correct. He pulled a valid license out that was not—

Q. And he produced the registration?

A. That's correct.

Q. And I think at sometime subsequently you found out that the license that was produced wasn't his driver's license, is that correct?

A. That's correct.

Q. All right. Now, is it your testimony that the first person you took out of the car was the driver?

A. That's correct.

Q. And did you have your service revolver pulled at that time?

A. No. I had no reason to.

Q. All right. And you took the driver out of the car, is that correct?

[33]

A. I just asked him to step out of the car, yes.

Q. And when the driver— Did you take all four out at once or did you take the driver out and then the others in order?

A. In order, yes. It was a two door vehicle and it was hard to get—

Q. It was a two door vehicle?

A. I believe it was, yes.

Q. Are you sure about that?

A. I'm not positive but, as I recall, it was.

Q. All right. Nonetheless, you took the driver out and then you searched the driver, is that correct?

A. Just patted him down, I didn't search every content of his pockets. I just wanted to make sure he didn't have a weapon with him.

Q. Did you tell him to empty his pockets?

A. At that point, no, I did not.

Q. Your testimony is you patted him down on the outside of his pockets?

A. That's correct.

Q. Now, in the meantime, the other three people were inside the car, is that correct?

A. That's correct.

[34]

Q. So then did you take them out one at a time, is that correct?

A. That's correct.

Q. And you patted them all down, is that true?

A. Right.

Q. All right. And you never had your own service revolver pulled at that time? You were working on one person at a time?

A. That's correct.

Q. All right. Now, you didn't find any weapons, is that correct?

A. I did not.

Q. All right. And now you have four people outside, is that true?

A. That is true.

Q. And they were outside because you directed them to be outside, is that correct?

A. That's correct.

Q. And had you arrested the driver for speeding?

A. Yes.

Q. All right. Now, you testified here—

THE COURT: At what stage did you place the driver under arrest for speeding?

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THE WITNESS: As he was getting out of the car Judge, I informed him the reason I stopped the vehicle is that he was speeding and I would issue him a summons for exceeding the speed limit. The summons wasn't physically written at that point but the driver was aware of the fact why I stopped the vehicle and he would be given a summons for speeding.

BY MR. CAMBRIA:

Q. Now, do you recall testifying before the Grand Jury that you asked all of the suspects, or subjects as you said, to get out of the car together, all at once? Do you recall saying that?

A. That would have been physically impossible. They all did get out.

Q. Excuse me, Officer. Do you recall making that statement.

A. No, I do not.

Q. All right. Now, Officer, midway down Defendant's A there is a question to you: What did you do then? And the answer is: At that point, I asked the subjects to exit the car together, driver from the driver's side out

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and then the other ~~three subjects~~ exited from the passenger's side, the north side of the Thruway.

Did you make that statement?

A. Yes, I did.

Q. Now, did you have all of them get out at the same time or does this statement mean something else?

A. Well, they didn't all four of them just jump out at the same time.

Q. I understand that.

A. They were all asked to get out of the car. They were individually patted down as they got out of the car.

Q. The question is this: Did you, as you said on direct examination, were you patting one down with the other three in the car or did you get all four out of the car and then start patting them down?

A. As the driver got out of the car, I did pat him down. He walked to the rear. I followed him to the rear of the vehicle that was stopped. At that point I walked to the driver – excuse me – passenger side of the car where Mr. Brown exited from the front seat and he was patted down. The two subjects in the back seat then exited through the passenger's side.

[37]

Q. So you didn't do them all at once?

A. The were asked to get out. They were getting ready to get out of the vehicle. One subject had been sleeping in the vehicle. One, I believe, had his shoes off so it took a matter of seconds for them to exit the vehicle.

Q. Now, Officer, is it your testimony here today that you immediately placed them under arrest for a violation of possession of marijuana?

A. As they were patted down, you know, they were split up and then I retrieved the bag which contained marijuana.

Q. Now, let me ask you a question. All right. So it's a fact then, when you got them all outside, they were not as yet under arrest for violation of marijuana, correct?

A. That's correct.

Q. Prior to the pat down they were not under arrest for violation of marijuana, is that correct?

A. That's correct.

Q. Now, after the pat down is it your testimony that you look into the car and you see this envelope we are talking about?

A. Prior to that I had smelled the marijuana.

Q. I understand that. After the pat down did you look in and see this envelope?

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A. I seen it previously. I went back to retrieve it after the pat down.

Q. Now, I believe you said there was a trace of marijuana in the envelope?

A. That's correct.

Q. You didn't see that from the outside?

A. No.

Q. Until you opened it?

A. No. I saw the envelope stamped "Supergold" in large letters and I have seen envelopes similar to that before.

Q. Now, let me ask you a question: Don't those envelopes contain cigarette papers usually?

A. No, they do not. That contains marijuana and that is the way it is bought. Also retrieved was a—

Q. Let me back up a second. What you are saying is: You see an envelope and this envelope says "Supergold" on it and that is a bag of marijuana. In other words labeled right on it "Marijuana Supergold".

A. It was labeled "Supergold" and I have seen that before, the same type of envelope.

Q. How many times?

A. I think on two different occasions prior to this occasion I have seen envelopes stamped "Supergold" envelopes of

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the same size, same type of stamp and in both cases or both points in question they did contain marijuana or traces of marijuana.

Q. Okay. Now, in this particular case you saw this envelope and you saw the markings on it but you couldn't see the marijuana, right?

A. No, I only smelled it, true.

Q. And obviously the envelope itself, if that is what was there and nothing else, that is not a crime?

A. No, it wasn't.

Q. You wouldn't arrest someone for that, would you?

A. The envelope?

Q. Yes.

A. There was enough—

Q. Just a minute. Just the envelope?

A. No, I wouldn't make an arrest.

Q. That envelope that said "Supergold", if it didn't have anything in it, you wouldn't have arrested them for that, is that correct?

A. No, I would not.

Q. So in this particular case you had the basis for your arrest when you saw what was in the envelope, is that correct?

[40]

A. No. I would say—

Q. Excuse me. Is that when you felt you had the basis to arrest them for violation of marijuana?

A. No.

Q. All right. When was it?

A. My basis for the arrest is when I first approached the vehicle and smelled the marijuana. What I was trying to determine is how many in the vehicle were smoking and how much more contraband was in the vehicle.

Q. Let me ask you this question. You mean to tell me you arrested them on the smell alone?

A. No.

Q. All right. All right then, what did you arrest them on?

A. What did I arrest them on?

Q. Yes.

A. What I arrested them on was the fact I did retrieve an envelope that did contain a small amount of marijuana.

Q. Okay.

A. Which previously I had smelled marijuana which led me to believe marijuana was present in the vehicle.

Q. Let me ask you this: If you just smell it and never found anything, would you have arrested them?

A. If I just smelled it and I didn't find anything?

[41]

Q. Right.

A. I wouldn't have the basis for an arrest.

Q. Okay. If you just found the envelope and you had smelled it but you hadn't found anything in the envelope, would you have arrested them?

A. If I had just found a plain envelope?

Q. No, that envelope and nothing in it and your smell, would you have arrested them?

A. No, I would not.

Q. So, in other words, when you saw the stuff in the envelope, that is when you had the basis to arrest them, is that correct?

A. That was the point when they were placed under arrest.

Q. Now they had already been taken out of the vehicle and they had been patted down, is that correct?

A. That's correct.

Q. All right. So, in other words, you directed them to get out of the vehicle, is that true?

A. That is true.

Q. By doing that you caused them, obviously, to open the doors on the vehicle and get out of the vehicle, is that true?

A. That is correct.

[42]

Q. Now, you say when you came up to the vehicle you say you smelled burning marijuana, is that true?

A. Burnt marijuana.

Q. Did you go— Well, strike that. Let me ask you this. I take it you patted them down all outside and then you go and retrieve the envelope?

A. I did.

Q. Or did you search the jacket first?

A. No, I retrieved the envelope first.

Q. Okay. And then did you go into the ashtrays and look in the ashtrays?

A. Yes, I did.

Q. All right. Was this before or after you searched the jacket?

A. Before.

Q. Okay. Therefore, you were looking for this burnt marijuana you said you smelled, is that correct?

A. That's correct.

Q. And you found it in the ashtrays?

A. I found some roaches or partially burned cigarettes in the ashtray. I could not tell if they had been recently put out or they had been there previously.

Q. Okay. But in any event the smell you are talking about

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is the result of something that was burning, is that true?

A. That is true.

Q. So you went to that area of the car where burning things are usually put and that is the ashtrays, right?

A. Correct.

Q. Now, this jacket we are talking about with the pockets that you say contained the alleged cocaine here, that was zipped up, wasn't it?

A. I think that jacket contained four or six pockets.

Q. My question is: The pockets contained zippers and the zippers were zipped up?

A. The twenty dollar bill or you are referring to the plastic bag?

Q. The pocket containing the alleged cocaine. Let's say the plastic bag and make it perfectly clear.

A. The plastic bag was not in a pocket zipped up. The twenty dollar bill—

Q. Which was zipped up?

A. That was zipped up, right.

Q. Okay. So now what you have done then is you have actually searched the entire car, everything you found in the car?

[44]

A. And the contents, correct.

Q. And the cocaine search we are talking about came after the marijuana search was completed, is that correct?

A. No, I don't search for one particular drug and then go back and search for another particular drug.

Q. You went into the ashtrays, did you not?

A. Yes, I did.

Q. Then the jacket search came after that, is that correct?

A. Yes.

Q. Did you pat the jacket down before you searched or did you go right into it, start taking things out?

A. No, I believe I patted it down.

Q. Did you feel a weapon?

A. No, I did not.

Q. Now, I take it first of all, Officer, the people in the car were initially detained as a result of your traffic violation, is that correct?

A. No, that is not correct.

Q. Well, what was the first thing that made you stop them?

A. The speeding.

Q. Okay. So you initially stopped them and detained them as a result of a traffic violation, is that correct?

A. No. If it had only been a traffic violation, they would

[45]

not have been detained.

Q. All right, the smell of marijuiana.

A. That's correct.

Q. That is what made you detain them?

A. That's correct.

Q. Now, Officer, is it your testimony here that you never told any of these people when they got out of the car to empty their pockets?

A. Not when they got out of the car, no, sir.

Q. Did you do that at anytime?

A. Yes, I did.

Q. When was that?

A. After they were placed under arrest, after they were advised of their rights and prior to transportation in my car.

Q. And I take it that was after you found this residue in the envelope we are talking about?

A. Yes.

Q. Did you test it at the scene, the residue?

A. No, I don't have means to test it at the scene.

Q. How much are we talking about in this envelope?

A. In the envelope, just a very minor case.

Q. Well, was it a seed?

[46]

THE COURT: Do we have a glass bag and envelope in this case?

MR. CAMBRIA: Yes. We are talking about the envelope on the floor, right?

MR. HARVEY: The envelope with marijuana.

THE WITNESS: A manila colored envelope that was on the floor.

BY MR. CAMBRIA:

Q. All right, how much was in there? You said a trace. What are you talking about seeds, stalks?

A. Enough of the seeds to identify it and yes, there was some small pieces of leaf material.

Q. But I take it you had to pick the envelope up, open it up and look in it to see this material, is that correct?

A. Yes, I did.

Q. Was there any smoke emanating from this envelope?

A. No.

Q. Was smoke or anything emanating from the jacket?

A. No.

Q. Okay. So you didn't smell burning marijuana in the jacket and you didn't smell it in the envelope specifically?

A. Specifically, no. It was just the odor was present in the car.

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Q. In the car, okay.

MR. CAMBRIA: Pardon me one moment, Your Honor.

Your Honor, I believe that would be all I would have at this time until I acquire the notes or reports.

THE COURT: The next witness on direct.

MR. HARVEY: No other questions.

THE COURT: The people rest?

MR. HARVEY: That's correct.

THE COURT: Do you wish to have a few minutes?

MR. CAMBRIA: As I say, Your Honor, we are not going to put anything on at this time although I would like—

THE COURT: No. If you have taken this procedure — Well, I want to dispose of it here. Are you asking for a continuance?

MR. CAMBRIA: Your Honor, I would be prepared at this point to do this in two steps.

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THE COURT: What I want to do — Of course, you have legal rights.

Mr. CAMBRIA: What I would like to do, Your Honor, frankly, based on the testimony we received so far, the people having the obligation to go forward to sustain the search into the jacket—

THE COURT: Make your appropriate motion.

MR. CAMBRIA: With regard to that, I would obviously like to under the circumstances as well as if the court denies it.

THE COURT: I am thinking about the procedure here. Your motion may be premature if you are going to request notes and enumeration of the exhibits, what happened to the envelope and tracings through the police records, the marking identification.

If the roaches were seized and subsequently destroyed, there should be a record concerning that, all relating to

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credibility. It seems to me a motion to dismiss at this time would be premature. You are going to try your case the way you want to.

MR. CAMBRIA: All I was saying, Your Honor, is I would like to make the motion but subject to denial being able then to reopen.

THE COURT: All right then, your motion to dismiss for failure to prove facts sufficient to deny an order of suppression at this time is denied for the following reasons:

You may step down, Officer.

This is not the case of a routine, an isolated road check. The Officer had, and I find beyond a reasonable doubt—

MR. CAMBRIA: Excuse me, Your Honor. May I say this, that it seems to me that if these other matters are produced for me and I am able to cross examine the officer, then it seems to me findings of fact would be premature.

[50]

THE COURT: But in order to deny your motion, I have to state a basis.

MR. CAMBRIA: Then I think the motion should not be made at this time, it should be withdrawn and we go through the rest of it.

THE COURT: All right, it will be continued.

Transcript of Proceedings (Continued)
August 2, 1978

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MR. HARVEY: Trooper Nicot?

THE COURT: You are still under oath, Trooper Nicot.

The people rested, according to my notes.

MR. CAMBRIA: I think this is the people's witness.

MR. HARVEY: Cross.

MR. CAMBRIA: This is cross of the people's witness.

CROSS EXAMINATION BY MR. CAMBRIA CONTINUED:

Q. Trooper, my recollection is that last week when you testified, you said that you came up to the car on the Thruway

and that at a particular point in time you smelled the odor of burning marijuana, is that correct?

A. Burnt marijuana, yes, sir.

Q. And at that time I believe you also testified that eventually you ordered these fellows out of the car, is that correct?

A. That's correct.

Q. You patted them down, is that correct?

A. That's correct.

Q. And then you went back into the car and looked at an

[3]

envelope which said "Pure gold," something such as that on it, is that correct?

A. "Supergold," that's correct.

Q. All right, supergold. Then you looked in the envelope, is that correct?

A. Yes, that's correct.

Q. And discovered the residue of marijuana or what you believed to be marijuana, is that correct?

A. There was marijuana, yes.

Q. Then I believe you testified you arrested the defendants for possession of that, is that correct?

A. Yes, that's correct.

Q. I take it at that point and this was before you got to the jacket, is that correct?

A. That's correct.

Q. So at that point in time it was fairly clear you had at least one arrest, is that correct?

A. No, I had four.

Q. I'm sorry. You had four people under arrest for possessing marijuana, is that correct?

A. That's correct.

Q. And this was prior to the time you discovered the material in the jacket, is that correct?

[4]

A. That's correct.

Q. All right. Now I take it at that point in time, let's assume you haven't found anything else, it's obvious these guys were under arrest and they were going in for marijuana, is that correct?

A. They were under arrest, yes.

Q. Okay. Now, Officer, eventually you say you came around and looked into the jacket, is that true?

A. Yes, during the search of the car the jacket was searched.

Q. Okay. And I believe you testified at the time you did this these fellows were outside the car, is that correct?

A. That is correct.

Q. Now, I believe you also testified that the jacket had some pockets in it and you found these items in the pockets, is that correct?

A. That is correct.

Q. And one of them was zippered, is that true?

A. Pardon me?

Q. One of them had a zipper on them and it was zippered?

A. Two of the pockets had zippers.

Q. Okay. Two of them were zippered?

A. That's correct.

[5]

Q. And in one pocket you found a twenty dollar bill, is that correct?

A. That's correct.

Q. And in another pocket or perhaps the same one you found a blue cross and blue shield card, is that true?

A. There was a blue cross and blue shield card, yes.

Q. Found in one of the pockets?

A. Yes.

Q. Now, you actually picked the jacket up, did you not? I mean, you had it right in your hand, is that correct?

A. Yes, I did.

Q. That was before you went into it?

A. I don't recall whether before I reached in the pocket or not.

Q. At that point in time though, you put the jacket in your possession, is that true?

A. I searched the jacket, yes, in the car.

Q. Did you take it with you?

A. I don't recall whether I took it to the station or not.

Q. You don't know if you ever took it to the station?

A. I believe I did. I'm not positive.

Q. Well, would it refresh your recollection that you testified last week that you had it and that at the end

[6]

of the proceedings before the Judge you gave it back to somebody for the family, do you remember?

A. Yes. It was returned to the defendant.

Q. So you took it with you from the scene down to the police station, is that correct?

A. I don't know if it ever was in the police station.

Q. Well, where did you take it?

A. It may have remained in my patrol car. I'm not sure.

Q. But, nonetheless, it was in your possession?

A. Yes, it was.

Q. Now, where did you take these gentlemen from the scene on the Thruway? Where did you go?

A. Back to the state police station at Junius Ponds, New York.

Q. All right. And did you make arrangements for a Judge to appear?

A. Yes, there was a Judge made available.

Q. All right. And was he made available as a result of a call placed by you?

A. Yes.

Q. Did you do that while you were on the Thruway?

A. Yes.

Q. So apparently he was waiting for you, is that correct?

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A. He was after I called him at the station. I called him from the Thruway Station.

Q. All right. So then he was alerted or you attempted to have him alerted as a result of your call on the Thruway, is that correct?

A. No. I called him on the telephone at the station.

Q. Did you make any call prior to that time?

A. Call to the Judge?

Q. Yes.

A. No, I did not.

Q. All right. So eventually the Judge then shows up at the station?

A. No.

Q. I'm sorry. Did you take the defendants to the court?

A. That's correct.

Q. And is that close to the station?

A. No.

Q. How far away is it?

A. It's about six miles, seven miles.

Q. All right. It's not a real long distance?

A. No.

Q. So you took all the defendants there and the charge laid against them included this charge for marijuana

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possession, is that correct?

A. The charges were written out formally at the state police station in Junius Ponds prior to going to the Judge's residence.

Q. Okay. You lodged the charge of marijuana at the scene, is that correct?

A. That's correct.

Q. All right. And then when you got to the Judge, there was a marijuana charge and there were others, is that true?

A. That's correct.

Q. All right. Now, Officer, did you prepare any reports in connection with this?

A. I did.

Q. All right. And may I have them? Do you have them with you?

A. Yes. Do you want just the report I prepared?

Q. Everything that you have that constitutes a report or reflection of your testimony here today and last week.

THE COURT: Those reports that you made.

MR. CAMBRIA: Yes.

THE COURT: Or reports others

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made based on any statement you might have made to them.

THE WITNESS: Yes. These are the rough copies that were made at the time of the arrest including a note on there as to who the owner of the vehicle is. On the back it reflects some information relative to where the car and where the cocaine was discovered.

BY MR. CAMBRIA:

Q. All right. The report reflects that you arrested the defendants for possession of marijuana, is that correct?

A. That's correct.

Q. And also the suspected cocaine, is that true?

A. That's correct.

Q. Thank you. Now, when did you make these reports, Officer?

A. The day of the arrest.

Q. All right. I'm sorry. Maybe to save some time, could you point out the date to me, the date the report is made?

THE COURT: You may approach the witness.

MR. CAMBRIA: Thank you.

THE WITNESS: (Indicating)

[10]

BY MR. CAMBRIA:

Q. Thank you. Now, are there any other reports or statements, Officer, which in anyway reflect upon the events here?

A. Yes.

Q. All right. And where are they?

A. Right here.

Q. All right.

A. These are the finished copies of the arrest report for the four subjects. These are the four arrest reports for the marijuana violation. These are the four arrest reports for the criminal possession fifth degree.

Q. All right. You said finished reports. When did you finish them?

A. I believe they were finished later on the day of the arrest and subsequently were forwarded through our station, I believe two days later. Physically I finished the reports that day, as I recall.

Q. Now, are there any other narrative, narrative reports? In other words, a recollection or a recitation of the facts by you?

A. No.

Q. So this is it?

A. Here is some other reports relative to the evidence. A

[11]

report that was made by me? This is an evidence report showing all the evidence that I had was turned over to Inves. Simbari.

Q. Would you just hand them to me, please. Now, eventually there came a point in time when one of the defendants pled guilty. Apparently pled guilty to a marijuana possession, is that correct?

A. That is correct.

Q. And that was at the scene of the Judge, is that correct?

A. That was at Judge Adam's residence where he holds court.

Q. And the individual there didn't have a lawyer, did he?

A. Pardon?

Q. Did the individual have a lawyer?

A. No, he waived his right.

Q. Excuse me, Officer. My question was: Did he have a lawyer?

A. No, he did not.

Q. All right. Thank you. What was the disposition? Strike that. Let me ask you this, Officer: What did you do with the items that you had seized? In other words, this envelope we are talking about, the roaches I think you testified about, the matters you found in the pocket of the jacket. What did you do with those items?

[12]

A. The roaches, the contents of the ashtrays from the vehicle along with one partially burned marijuana cigarette, the twenty

dollar bill containing the suspected cocaine, the plastic bag with the suspected cocaine was all turned over to Inves. Simbari at State Police, Canandaigua.

Q. What did you do with them actually from the premises? Did you put them in some kind of an envelope and transport them to the station or what?

A. When I left the vehicle en route to State Police, Junius Ponds?

Q. Yes.

A. The cocaine was left in the jacket until I got to State Police Junius Ponds.

Q. So you took the jacket with you then?

A. That's correct. It was in the vehicle.

Q. All right.

A. I don't recall whether I physically had it inside the station or not.

Q. In your vehicle?

A. Pardon?

Q. In your vehicle?

A. In my vehicle, yes.

Q. Go ahead.

[13]

A. The marijuana was placed into an envelope and transported to the State Police Junius Ponds Station where an evidence tag was made out and it was secured in another brown envelope with the evidence tag attached to it.

Q. Okay. In any event, did you ever cuff any of these four defendants?

A. No. I only had one set of handcuffs.

Q. So you just put them in your vehicle?

A. That's correct.

Q. Okay. And I suppose you got a little bonus arrest, didn't you? You had one for marijuana and then you found this other material so now you had two.

A. We don't have such a thing as a bonus arrest.

Q. You know what I mean. You had another one. You already had one and then you found another one, is that correct?

A. Yes, there was more than one arrest made.

MR. CAMBRIA: Okay. At this point, Your Honor, I have nothing further.

MR. HARVEY: No other questions.

THE COURT: Proofs are closed.

Discussion

• • •

[14]

Mr. Cambria?

MR. CAMBRIA: Yes, Your Honor. I will attempt to be brief, Your Honor but I think under the circumstances and probably the very unique circumstances, recently I have discovered a U.S. Supreme Court case which I think covers this case. Specifically it is the United States v. Chadwick and I have a copy of it here. I'm sorry I don't have the official citation.

THE COURT: Was that the search of the trunk of the vehicle?

MR. CAMBRIA: That's right.

[15]

THE COURT: I have the citation.

MR. CAMBRIA: Thank you, Your Honor. I would like to say first of all—

THE COURT: I have also read it.

MR. CAMBRIA: The search of the car, Your Honor, I do not believe that the discovery of the so called smell and certainly we are at the officer's mercy with regard to smell, and the search of the ashtray and search of the envelope all occurred prior to the discovery of the jacket and the officer testified that he arrested these individuals—

THE COURT: Excuse me, Mr. Cambria. It's been some time since I read the Chadwick case. I think it was exigent circumstances, wasn't it?

MR. CAMBRIA: That's right.

THE COURT: Might I have a copy of the decision.

MR. CAMBRIA: That is the only one I have, Your Honor in Chadwick.

THE COURT: I will let him read

[16]

it before he responds.

MR. CAMBRIA: In Chadwick, Your Honor, the important decision, as Your Honor pointed out or the important factor is exigent circumstances. In that particular case some FBI agent had the most probable cause that probably anyone could have for searching for a drug. They had a dog, talcum powder coming out of the trunk, they had an experienced railway official telling

what they observed and there is no question that is a traditional way drugs have been shipped, talcum powder and so on. Then the FBI agent comes in. They watch individuals take the trunk, place it into the open trunk of their car, their vehicle which is outside the train station and running. At that point in time they go up and arrest the two individuals for the possession of a controlled substance based upon the tremendous showing of probable cause that they had in that case. They then take the trunk into their possession

[17]

which weighed two hundred pounds. They take it down to their facility and they then search the contents of the trunk and the issue before the Supreme Court and, in fact, all the courts as it went up is was there exigent circumstances for searching the trunk without a warrant.

Now, the government attempted to say this came within the warrantless car search exception and, therefore, they should be able to search the trunk but the U.S. Supreme Court and all the other courts that ruled on the case said that there was no exigent situation and the reason was because the men were already under arrest. There was no threat that the material would be wisked away or anything else, it was readily able to be taken into custody by the police officer as it was in that particular case and that regardless of the fact that they had much, much probable cause, the point of the matter still is there was no exigent situation because of the predicate arrest.

[18]

Now then, the court then went on to attempt to distinguish the difference between the search of a car exception and the search of a personal property located

within a car and the Supreme Court said in the car exception there is not an expectation of privacy as there would be in personal property, the reason being it's a transportation article, the things that are inside, the articles, are things that usually are in plain view. An individual inside of that car does not expect that the car itself would afford him that much personal privacy.

Now the Supreme Court has only gone one step beyond and the obvious case is Opperman v. South Dakota where they permitted the search of the glove compartment only because the ownership papers may be found in the glove compartment but both Opperman and Chadwick said that personal property stands on different footing and I might read from the Supreme Court decision

[19]

one important quote: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. It travels the public thoroughfare where both the occupants and the contents are in plain view".

The court then went on:

"A person's expectation in privacy in personal luggage are substantially greater than in an automobile". The court then said: "Once the law enforcement officers have reduced the luggage or other personal property not immediately associated with the person of the arrestee, then and there they have reduced it to their exclusive control and there is no longer any chance that the arrestee might gain access to the property or seize a weapon or destroy the weapon and it is no longer within the "incident to arrest" circumstances".

Discussion

Now, in this particular case we have

[20]

no exigent situation because the officer tells us they were all under arrest for marijuana. They are people from out of town. They are on the Thruway. There is no question what is going to happen to them. They are already in custody. Then the personal property that we are talking about, the jacket, we have even a greater expectation of privacy in a jacket than you would have in a trunk. What could be more personal than the contents of someone's pocket. In this particular case we look at the jacket. We find a twenty dollar bill. That is a very personal item. We find a very personal medical card. That is a personal item. There is no question of the expectation of privacy with regard to the contents of that pocket. We don't have a two hundred pound jacket. We have a jacket which the officer tells us he takes with him to the station.

At that point in time, Your Honor, I would submit to you that the exigent

[21]

situation disappeared with regard to these personal items and then it was up to the officer to go to the magistrate and spread out before him what he has and see whether or not a warrant would be issued and here we even had a magistrate within a short period of time.

I might point out in Judge William Ringel's book which I am assuming you have on search and seizure, the 1967 supplement, he points to People v. Counterman which is a Supreme Court of Colorado decision and is cited in 556 Pacific 2nd, 41 in 1976. There the Supreme Court of Colorado held that the car exception does not apply to a

knapsack that happened to be in that vehicle and I think we certainly have the same thing here.

In Chadwick, because of the fact they were arrested the exigent situation was gone and the expectation of personal privacy was much more than the vehicle.

It was ruled to be unlawfully taken

[22]

and, Your Honor, I submit to you in the particular case here we have exactly the same thing.

THE COURT: All right. Mr. Harvey?

MR. HARVEY: I won't be long. I have another lawsuit on my mind at this time, Your Honor.

THE COURT: For the record, I am handing counsel the decision.

MR. HARVEY: Clearly this case, I don't need to read it, Your Honor I heard enough of Mr. Cambria, is distinguishable. That is the case of the People v. Belton and the circumstances are certainly distinguishable from Chadwick. This is a jacket laying in plain view on the back seat. He had every right, the officer, to execute his search, or the gathering of evidence or potential evidence at that point in time when he issued an appearance ticket or placed these people under arrest for a violation which he admits of marijuana which provides for an appearance ticket

[23]

under the law. Certainly it would be telling the officer not to do his job. This is certainly the circumstance and it is part of the vehicle. The case clearly holds it is not personal property, i.e., a two hundred pound trunk that

some individual tucked away in the vehicle but rather it was in plain view and he would be remiss, the officer, in his duties if he did not continue under the circumstances and obtain what he ultimately obtained. Under the circumstances of this case it was certainly a proper stop, a proper look around the vehicle, certainly he smelled something, and an all together proper warrantless search in this particular case.

MR. CAMBRIA: Your Honor, I may say one thing. It was certainly in plain view. In Chadwick the trunk of the car is open and the trunk is sitting there and the motor running.

THE COURT: Yes. How do you distinguish the fact the search was made

[24]

at headquarters some two hours after it was taken into custody in Chadwick.

MR. CAMBRIA: Your Honor, I think—

THE COURT: As I recall Chadwick, that was the circumstance, was it not?

MR. CAMBRIA: It was about an hour, hour and a half.

THE COURT: He wasn't going to go anyplace weighed down with two hundred pounds there in the station house, he could have gotten a warrant.

MR. CAMBRIA: Yes.

THE COURT: That is the point that catches my interest.

MR. CAMBRIA: With regard to this, Your Honor, we take the decision, we see that interest as the telling factor as far as the Supreme Court is concerned. It's the ex-

pectation of privacy in the article and whether or not an exigent situation exists. In this particular situation it seems to me it's just as easy to take that jacket. In fact, easier to take this into

[25]

exclusive custody in taking the people downtown making an issue of privacy and exigent situation. Those are the things.

THE COURT: We have bifurcated this hearing so I might be wrong on the facts and if so, correct me. There was a search and discovery of cocaine occurring on the road when the car was stopped, is that not correct?

MR. CAMBRIA: Yes.

THE COURT: Obviously you researched the case and I compliment you on it because it certainly is a help to the court.

Are you also familiar with Daggie against the State an Alaska Supreme Court case where a car was stopped after a high speed chase and marijuana was in plain view and they held that the seizure of a paper bag in the back seat was okay because it was made contemporaneously with the arrest even though the driver was out of the car while the arrest was being made.

[26]

The court in that case said a search could extend only to the visible area within easy presence of the suspect, not closed places or closed containers which seems to me to be a distinction which might be applicable as against Chadwick.

MR. CAMBRIA: I am not familiar with it, Your Honor. I would like the opportunity to read and be able to

respond. It seems to me we are talking about personal property as opposed to paper bags. It's still a distinction as far as privacy. Frankly, I don't know the rest of the facts in the case.

THE COURT: I am in a bind for time. I am prepared to decide the motion. If you find something that would justify a re-argument, I will certainly be liberal.

Findings and Conclusions

I make the following findings of fact beyond a reasonable doubt and arrive at the following conclusions of law.

I find that the state policeman, Douglas Nicot, was on duty on April 9, 1978

[27]

and he noticed coming from behind him a late model Chrysler automobile being operated at a high rate of speed. He waited for it to come abreast of him and then he pulled to the right and watched it pass and clocked the vehicle doing seventy-five miles per hour in a fifty-five mile an hour speed zone.

He at that time was driving an unmarked car. He followed the vehicle and he stopped it.

He caused the driver to produce the registration and caused him to get out. He ordered the others to get out. He patted them down and found nothing as a result of the pat down.

During the procedure he noticed the smell of burned marijuana.

His subsequent search of the vehicle showed roaches, marijuana residue and partially burned cigarettes in the ashtray. He saw on the floor of the vehicle in plain view an envelope marked "Supergold" which by his past training and experience indicated

[28]

an envelope usually and customarily used for the possession of marijuana.

They were arrested for possession of marijuana.

He observed a jacket laying inside the seat which contained eight pockets, two of them were zippered.

In one of the pockets he found a card which identified the jacket as belonging to the defendant in this case, Mr. Belton.

In one zippered closed pocket not visible without his having taken the jacket in his hand and without having unzippered the pocket, he found the twenty dollar bill rolled up in which was a substance which he had grounds reasonably to believe was cocaine and later, for the purposes of this hearing, was established to be cocaine. Also a small glassine envelope, plastic which contained similar powder and he took that into his possession.

I find that because of the speed he had reasonable cause. This is distinguished

[29]

from People against Engel which was a routine traffic check. This was a car that was speeding at a high rate of speed. He had reasonable cause to stop. He had reasonable cause when he smelt the marijuana to get them out and take them under arrest.

Findings and Conclusions

I find that Chadwick should be, at least with a line of cases, restricted to the circumstances. There the police had possession of the trunk. It was a large bulky object. It was in the station house. The defendants were in custody and they weren't going anyplace. Here a single policeman in a rural area was in the presence of four defendants, four men. What would or would not have happened to the jacket, whether it would be carried to the police station by one of the individuals?

There is, of course, no evidence in this case from which I could find there was cause to pat down the jacket for a weapon, there being absolutely no proof in the case that was so.

[30]

Following the decision of the Alaska Supreme Court in Daggie v. the State of Alaska, 14 criminal law reports 2131, I find that there were exigent circumstances and that the officer was authorized to search the jacket. Even though its owner was outside and under arrest it was in open view and it was not in a closed space or in any closed opening and the fact that the pockets of the jacket were zippered does not remove the case from the exigent circumstance exception to search and seizure.

You may have an exception to every one of the findings of facts and conclusions of law that the court has just made.

If you wish to re-argue after having read Daggie, I will assure you I will be liberal in granting that.

MR. CAMBRIA: Thank you.

• • •

Order Denying Suppression,
Filed September 29, 1978

(SAME TITLE)

PRESENT: HON. GEORGE REED, Judge

The defendant having moved this Court for an Order suppressing evidence, and any information obtained therefrom and suppressing the use of said evidence upon the trial of the above named defendant, and the issues raised by said motion having been duly heard and tried before this Court on the 26th day of July, 1978, and the 2nd day of August, 1978,

NOW, on reading and filing the notice of motion dated June 30, 1978, and the affidavit of Paul J. Cambria, Jr. sworn to on the same date, and the affidavit of Roger Belton sworn to on the 1st day of July, 1978, with proof of service thereof on behalf of the defendant, in support of the motion, and the affidavit of District Attorney James Harvey, sworn to on the 17th day of July, 1978, in opposition thereto and on all the evidence adduced before the Court on the trial of the issues raised by said motion on the above referenced dates, and due consideration having been had and the Court having rendered its decision on the record, orally, on August 2, 1978, it is

ORDERED, that the said motion be denied.

/s/HON. GEORGE REED
Hon. George Reed, Judge
Ontario County Court

ENTER:

Notice of Appeal, Filed September 29, 1978

(SAME TITLE)

SIRS:

PLEASE TAKE NOTICE that the defendant ROGER BELTON, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, from a judgment of conviction of the County Court of Ontario County rendered on the 29th day of September, 1978, convicting the said defendant of attempted criminal possession of a controlled substance in the sixth degree (§§110.00, 220.06 of the New York State Penal Law), and from the sentence therein imposed on the same date, and from each and every part of said judgment and sentence, and from each and every intermediate order therein made, most particularly the order of this Court denying suppression of evidence entered August 2, 1978.

DATED: Buffalo, New York
September 26, 1978

Yours, etc.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorneys for Roger Belton
One Niagara Square
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TO: JAMES HARVEY, ESQ.
District Attorney of Ontario County
Courthouse
Main Street
Canandaigua, New York 14424

Judgment of the New York Supreme Court, Appellate Division, Fourth Department, Filed May 22, 1979

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: DILLON, P.J., CARDAMONE, SCHNEPP, DOERR, MOULE, JJ.

People of the State of New York,

Respondent,

vs.

Roger Belton,

Appellant.

The above named Roger Belton, defendant in this action, having appealed to this Court from a judgment of the Ontario County Court, entered in the Ontario County Clerk's office on September 29, 1978 and said appeal having been argued by Paul Cambria of counsel for appellant, Timothy Buckley of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously affirmed.

Opinion by Moule, J., which is hereby made a part hereof.

Entered: May 22, 1979

MARY F. ZOLLER, *Clerk*

Opinion of the New York Supreme Court, Appellate Division, Fourth Department, Filed May 22, 1979

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Fourth Department, May 22, 1979

SUMMARY

Appeal from a judgment of the Ontario County Court (Harold Stiles, J.), rendered September 29, 1978, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

APPEARANCES OF COUNSEL

Lipsitz, Green, Fahringer, Roll, Schuller & James (Paul J. Cambria, Jr., of counsel), for appellant.

James R. Harvey, District Attorney (Timothy Buckley of counsel), for respondent.

OPINION OF THE COURT

On this appeal defendant contends that the trial court erred in denying his motion to suppress cocaine found in his jacket which was searched without a warrant in the rear seat of an automobile from which defendant had exited in order to be arrested for possession of marihuana. On April 9, 1978 a State Police officer observed an automobile with four passengers traveling 75 miles per hour on the New York State Thruway. Upon stopping the auto and questioning the driver, the officer smelled the odor of marihuana coming from within the auto and observed on the floor of the auto an envelope stamped "Supergold" which he recognized as a type of envelope that is

commonly used to sell marihuana. The officer ordered the occupants from the auto and patted each down. He then removed the "Supergold" envelope from the auto and, when he found that it contained traces of marihuana, he arrested the four for possession of marihuana, read them their rights and searched them. The officer then searched the passenger compartment of the auto and seized marihuana cigarette butts which he observed in the ashtrays. He also searched five jackets that he found in the back seat and, in one of them, he found cocaine and defendant's identification. The officer then arrested the four for possession of cocaine.

On May 24, 1978 the Ontario County Grand Jury indicted defendant for criminal possession of a controlled substance in the fifth degree. Defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree following the Ontario County Court's denial of his motion to suppress the cocaine.

Defendant contends that the warrantless search of his jacket violated his constitutional rights. The cornerstone of any Fourth Amendment inquiry is reasonableness and a warrantless search must come within one of the "specifically established and well-delineated exceptions" to the warrant requirement *(Katz v United States,* 389 US 347, 357). The exceptions are (1) a consensual search; (2) seizure of evidence and contraband in plain view; (3) search and seizure incidental to a lawful arrest; (4) search and seizure based upon probable cause, and, applicable to automobile searches; (5) a search in exigent circumstances where there exists probable cause *(People v Mahoney,* 60 AD2d 107, 109-110). Inasmuch as defendant does not challenge the lawfulness of either the initial stop or the arrest for possession of marihuana, the narrow question on this appeal is whether the search of defendant's jacket in the back seat of the vehicle can be justified under one of the above exceptions.

Opinion of the New York Supreme Court, Appellate Division, Fourth Department, Filed May 22, 1979

The People contend that the search was justified as a search incident to arrest and we agree. Upon a lawful arrest, a search may be made of the person of the arrestee and of the area within the arrestee's control *(United States v Robinson,* 414 US 218, 224; *Chimel v California,* 395 US 752, 763). This area includes those personal effects of the arrestee that are "ready to hand" *(People v Weintraub,* 35 NY2d 351, 354). Warrantless searches incident to arrest are justified by the officer's need to find weapons and easily destructible evidence within the arrestee's immediate area *(United States v Robinson, supra; Chimel v California, supra).* Such searches are also allowed so that an officer can discover the fruits of the crime, the instrumentalities used to commit the crime and contraband *(People v Lewis,* 26 NY2d 547, 550-551).

Defendant contends that *United States v Chadwick* (433 US 1) mandates suppression of the cocaine. In that case the United States Supreme Court held unreasonable as a search incident to arrest the search of a footlocker seized from an automobile upon the defendant's arrest and searched one and one-half hours later at a police station. In *People v De Santis* (46 NY2d 82) the Court of Appeals interpreted *Chadwick* narrowly and allowed, as a search incident to arrest, the search of a suitcase in defendant's possession at the time of arrest. The court found the search reasonable because it had a close nexus to the time and place of the arrest *(People v De Santis, supra).* The court noted that "the practical impetus for allowing these searches lies in the fact that the arrest itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality *de minimis" (People v De Santis, supra,* p 87, citing *People v Perel,* 34 NY2d 462, 467-468; see, also, *United States v Ochs,* 595 F2d 1247).

Opinion of the New York Supreme Court,
Appellate Division, Fourth Department,
Filed May 22, 1979

In *People v Cofield* (55 AD2d 113, affd 43 NY2d 654), the First Department found reasonable as a search incident to arrest the search of a paper bag within a satchel on the back seat of defendant's auto while defendant stood outside the auto. Also, in *People v Abramowitz* (58 AD2d 921), the Third Department allowed as a search incident to arrest the search of a leather bag behind the driver's seat of a vehicle after the driver had been arrested for driving while impaired and after pills were found during a search of his person (see, also, *People v Sauger*, 58 AD2d 919; *People v Mangan*, 55 AD2d 247, 249).

The officer's search of defendant's jacket which he found in the vehicle did not exceed constitutional limits. The search was reasonable in scope, intensity and duration. Once defendant was validly arrested for possession of marihuana, the officer was justified in searching the immediate area for other contraband.

The judgment should be affirmed.

Dillon, P.J., Cardamone, Schnepp and Doerr, JJ., concur.

Judgment unanimously affirmed.

Order of the New York Court of Appeals Granting Leave to Appeal and Fixing Bail, Filed June 27, 1979

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ROGER BELTON,

Appellant.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to CPL 460.20 it is

ORDERED that permission be, and it hereby is, granted to the above named appellant to appeal to the Court of Appeals; and notice having been given pursuant to CPL 460.60(2), it is further

ORDERED that, pursuant to CPL article 520, the defendant be continued on bail in the sum of $750.00, as at present provided.

Dated at Buffalo, New York
June 27, 1979.

/s/ MATTHEW J. JASEN
Associate Judge

*Description of Order:
Order of Apellate Division, Fourth Department, entered May 22, 1979, affirming Ontario County Court judgment entered September 29, 1978.

Notice: This stay will terminate if the appeal has not been argued or submitted within 120 days (CPL 460.60[3]).

Judgment of the New York Court of Appeals,
Filed June 5, 1980

ORDER OF THE NEW YORK COURT OF APPEALS

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 208

The People &c.,

Respondent,

v.

Roger Belton,

Appellant.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James; *the respondent appeared by* James R. Harvey.

The Court, after due deliberation, orders and adjudges that the order is reversed, motion to suppress granted and indictment dismissed. Opinion by Cooke, Ch.J. All concur except Gabrielli, J., who dissents and votes to affirm in an opinion in which Jasen, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Ontario County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 5, 1980.

Opinion of the New York Court of Appeals, Filed June 5, 1980

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Argued April 21, 1980; decided June 5, 1980

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 22, 1979, which affirmed a judgment of the Ontario County Court (Harold Stiles, J.), convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point, the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana. After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then re-entered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification. Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division affirmed, holding that the warrantless search of the jacket was lawful as incident to defendant's arrest for possession of marihuana.

Opinion of the New York Court of Appeals,
Filed June 5, 1980

The Court of Appeals reversed, granted the motion to suppress and dismissed the indictment, holding, in an opinion by Chief Judge Cooke, that, following a lawful arrest, the privacy interest of the arrestee in an article remains intact once he is effectively neutralized or the article is within the exclusive control of the police, at which point any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer incident to the arrest.

OPINION OF THE COURT

Chief Judge Cooke.

A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana.

After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then reentered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification.

Opinion of the New York Court of Appeals,
Filed June 5, 1980

Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division affirmed, holding the warrantless search of the jacket lawful as incident to defendant's arrest for possession of marihuana (68 AD2d 198). There should be a reversal.

Analysis begins with the general proposition that, except in a few narrowly circumscribed instances, the Fourth Amendment condemns warrantless searches and seizures as unreasonable *(Coolidge v New Hampshire,* 403 US 443, 455). The privacy interest of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field. Reasonableness of the intrusion does not turn upon the belief, however well founded it may be, that the article sought is concealed in a particular place. The Constitution, therefore, focuses upon the desirability of having the judiciary, rather than the police, determine when searches and seizures are permissible and the limitations that are to be placed upon such activities. Necessarily, then, the predicate for the warrantless search must be carefully examined to ensure that its scope, both temporally and geographically, did not exceed constitutional limits.

The People maintain that the warrantless search of defendant's jacket was reasonable on the ground that it was incident to his lawful arrest. A custodial arrest of a suspect based upon probable cause without a warrant in a public place constitutes a reasonable intrusion under the Fourth Amendment *(United States v Watson,* 423 US 411). That arrest being a lawful and substantial intrusion, any search incident thereto requires no additional justification *(People v Perel,* 34 NY2d 462; see, also, *People v Weintraub,* 35 NY2d 351).

When a suspect is placed under custodial arrest, there is always present the danger that he may seek to use a weapon to

effect an escape or destroy or conceal evidence of a crime. Thus, to safeguard himself and others, and to prevent the loss of critical evidence, it is reasonable from a Fourth Amendment perspective for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" *(Chimel v California,* 395 US 752, 763). Upon arrest, the privacy interest of the arrestee in possessions within the arrestee's immediate control are subsumed within the State's interest in discovering weapons, thwarting access to means of escape and preventing the destruction of evidence (see *United States v Robinson,* 414 US 218). But while the arrest establishes the authority for the warrantless search, it does not transform the initial predicate into carte blanche justification to rummage through all articles which might bear some connection to the arrestee (see *Dyke v Taylor Implement Co.,* 391 US 216; People v Williams, 37 NY2d 206; *People v Lewis,* 26 NY2d 547).

The privacy interest of the arrestee in an object remains intact once he is effectively neutralized or the object is within the exclusive control of the police (see *Arkansas v Sanders,* 442 US 753; *United States v Chadwick,* 433 US 1). At that point, any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer an incident to the arrest (but cf. *People v De Santis,* 46 NY2d 82; *People v Darden,* 34 NY2d 177).[1] The critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search (see *United States v Edwards,* 415 US 800).

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[1]To the extent that these cases may be read to suggest otherwise, they are disapproved.

In this regard, *United States v Chadwick* (433 US 1, *supra*) is instructive. There, railroad officials in San Diego observed two individuals loading a heavy footlocker onto a train bound for Boston. Their suspicions were aroused when the trunk leaked talcum powder, a substance commonly used to mask the odor of marihuana. The officials notified Federal agents who relayed the information to their counterparts in Boston. When the train arrived in that city, the two individuals who had loaded the footlocker in San Diego were on hand and lifted it into the trunk of Chadwick's waiting car. At that point, Federal agents arrested all three, seized the footlocker and transported them to the Federal building. There, with the arrestees safely incarcerated, the agents opened the trunk and seized a large quantity of marihuana. In holding the search unlawful, the court rejected the notion that it was incidental to Chadwick's arrest. Said the Court: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" (433 US, at p 15; see, also, *Arkansas v Sanders*, 442 US 753, *supra*).

That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. Defendant's arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and

control of the police may not be upheld as incident to his arrest *(United States v Chadwick,* 433 US 1, *supra; Arkansas v Sanders,* 442 US 753, *supra).* The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent.[2] There was, therefore, no reason why the search should not have awaited the issuance of a warrant.

Accordingly, the order of the Appellate Division should be reversed, the motion to suppress granted and the indictment dismissed.

Gabrielli, J. (dissenting). I respectfully dissent. Although I am in agreement with the standard legal principles enunciated by the majority, I cannot concur in what appears to be an obvious misapplication of those principles to the facts of this case.

A warrantless search based on probable cause is permissible if the facts underlying the search bring it within any of several narrow exceptions to the warrant requirement with which this court is fully familiar. One such exception to the warrant requirement is a search incident to a lawful arrest. Although this particular exception has had a somewhat uncertain history (compare *Trupiano v United States,* 334 US 699, with *United States v Rabinowitz,* 339 US 56), it is now well settled and cannot be disputed that a police officer making a valid arrest may legitimately engage in a limited search of both the person of

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[2]One searches the record in vain for support of the dissenter's claim that at the time of arrest—the point from which the predicate for the warrantless search is measured—"the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer" (dissenting opn, p 454). Indeed, the facts, as found at the suppression hearing and affirmed by the Appellate Division, were to the effect that the jacket was searched after the defendant was removed from the vehicle and then placed under arrest.

the arrestee and "the area from within which he might gain possession of a weapon or destructible evidence" *(Chimel v California,* 395 US 752, 763) without first obtaining a search warrant. Moreover, although the general rationale for permitting warrantless searches under certain circumstances is the need to allow a police officer sufficient flexibility to protect himself from possible danger and to prevent the destruction of evidence (see, generally, *Arkansas v Sanders,* 442 US 753, 759), a warrantless search incident to a lawful arrest may be made "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence" *(United States v Chadwick,* 433 US 1, 14).

To be sure, such a search is subject, as it should be, to careful judiciary scrutiny before its fruits may be admitted into evidence. As the Supreme Court has recently stated, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest' * * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" *(United States v Chadwick, supra,* at p 15). While these principles are readily articulated, their application to individual cases may seem, at first blush, to be a task of some complexity. This is so in large part because each case must turn upon its peculiar facts and "an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights" *(Arkansas v Sanders,* 442 US 753, 757, *supra).* This observation is particularly apt when applied to a case such as this, in which all members of the

court are agreed that the validity of the challenged search turns upon the degree to which the defendant and his property had come within the exclusive control of the police at the time of the search. Clearly, we are here presented with a valid arrest based upon probable cause. This is, as it must be, conceded by all. Moreover, there exists no dispute but that the officer's search of the persons of the defendant and his companions and the initial search of the car for contraband were entirely proper. The only issue that divides this court, then, is whether the officer acted illegally by extending his search to include the pockets of the jackets thrown on the back seat of the automobile. The courts below, which by law, unlike this court, are empowered to resolve disputes of fact, have concluded that the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer. I find no justification for disturbing this essentially factual determination and, based upon this finding, the conclusion that the search was incidental to a lawful arrest cannot be avoided.

Certainly there exists sufficient evidence in the record before us to support the factual findings made by the courts below. Indeed, this case is illustrative of the type of situation in which a warrantless search is most appropriate. We are not here faced with an extended search of a defendant's property after the defendant has been completely subdued and all actual danger has passed. Rather, this search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters or radioing for assistance. The situation was still fluid, and neither the suspects themselves nor their property had as

yet been reduced to the exclusive and certain control of the police. I cannot agree that under these circumstances the officer acted improperly in searching the jackets found on the back seat of the automobile. The potential for danger to the officer or for the destruction of evidence is patent, and thus the search must be deemed incidental to the arrest.

I must confess that I am somewhat puzzled by the rationale adopted by the majority of this court today, for it appears rather ingenuous. Instead of undertaking that careful factual analysis of the realities underlying the continuing encounter between the lone officer and the four suspects which is so necessary to fairly judge the reasonableness of the officer's actions, the court premises its decision completely upon an uncertain assumption drawn from two isolated facts. Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption.

Accordingly, I vote to affirm the order appealed from.

Judges Jones, Wachtler, Fuchsberg and Meyer concur with Chief Judge Cooke; Judge Gabrielli dissents and votes to affirm in a separate opinion in which Judge Jasen concurs.

Order reversed, etc.